

February 6. 1727.

A N S W E R S

For *ROBERT HESLOPP*,

T O

The Petition of *Alexander Horsburgh* Chirurgeon
in *Glasgow*.

ROBERT HESLOPP being put as an Apprentice to Mr. *Horsburgh* at a Time when his Master, being but just set up, could have no great Fund of Buſineſs for the Matter of his Inſtruction, and there being no leſs than Forty Pounds *Sterl.* given to the Maſter himſelf, and five Guineas to the Maſter's Wife, which Sum, if the Place of the Country where the Apprentice was to be educated, and the Circumſtance of the Maſter above mentioned, be conſidered, muſt appear not an unhandſome Recompence, for any Thing that Mr. *Horsburgh* obliged himſelf to do, or was incumbent upon him as a Maſter, and Mr. *Hodgſon*, the Apprentice's Relation and Cautioner, expected ſuch a Treatment of his Friend, as the Fee given with him, the Circumſtances of his being a Gentleman's Son, and at a great Diſtance from his Friends, ſeemed naturally to call for: But, as your Lordſhips have been informed, Matters tell out quite otherwiſe: For Mr. *Horsburgh*, for what Reaſon he beſt knows himſelf, after full Aſſurances given him by the Apprentice's Father, of full Satisfaction to every Thing that he could make the leaſt Shadow or Appearance of a Claim to, and after poſitive and repeated Declarations to the Cautioner, that he reſted ſatisfied, with the Aſſurances given him, took it into his Head, to throw the Boy into Priſon; and in order to amuſe and frighten People, and ſo to prevent his being called to Account, for ſuch a raſh and unjuſtifiable Piece of Conduct, Mr. *Horsburgh* has raiſed a Proceſs, founded upon ſome odd and unreaſonable Clauſes he had got clapt into the Indenture, and ſtrange Extenſions of ſuch as are uſual and ordinary. Tho', if a Defence founded upon a publick Law needed any Reaſon for its being made Uſe of, exorbitant Advantages endeavoured to be taken, and obſtinately inſiſted upon, barbarous and inhumane Treatment would be ſufficient; yet when it is conſidered, that the Indenture which is the Ground of the Maſter's Proſecution, is ſo directly contrary to Law, that no Freedom in the Place of Service could follow upon it, tho' bargained for; and that the Time ſpent therein muſt, becauſe of the Incapacity inflicted by the Act of Parliament, be lookt upon as ſo much of the moſt valuable Part of a Man's Life, employed to no Manner of Purpoſe, there will appear an abſolute Neceſſity of having Recourſe to the Statute, 8vo. *Annæ*.

Your Lordſhips having, by your Interlocutor *January* the 20. found it relevant to annul the Indentures, ' That the Compliment to the Wife, was contracted or agreed for, at, or before ſigning the Indenture; and alſo found it relevant, that ' the Compliment was given with the Maſter's Knowledge, after ſigning the Indenture, and before tendering the Duty, tho' not previously bargained for. '

There is now a Bill given in, praying an Alteration of it. In Answer to which, *Robert Heſlopp* ſhall offer a ſhort Recital of the Statute, and then ſhall follow the Petitioner through his Arguments, which are neither new, nor in any other Light than what they have appeared in before your Lordſhips already.

When the Duty was to be laid upon Apprentice-fees, the firſt Thing was to diſcribe and aſcertain what was liable to that Duty, and this we find done very accurately in the Act 8vo. *Annæ*, where every Thing given, paid, contracted or agreed for, with, or in relation to every Clerk, Apprentice or Servant, is declared liable; and likewiſe the Duties granted by the Act, are to be answered and paid for the full

full Value of any Thing not being lawful Money of Great Britain, which shall directly or indirectly be given, assigned, conveyed, delivered, contracted for, or secured to, or for the Use or Benefit of any Master or Mistress, with, or in respect of any Clerk, Apprentice or Servant. Here it is as plain as Words could make it, that every Thing was designed to be included that is given upon the Account of any Apprentice, without distinguishing and separating what is given for Instruction, from what is given or paid for Board, or upon any other Account, it is enough that it be given in relation to, or in respect of an Apprentice; yea, the Act has gone so far, as to impose a Duty upon what is barely contracted for, and that Duty is to be paid by the Master, tho' he should never touch a Farthing of what is so contracted for. Can it then be supposed, that what the Master has actually received, and has in his Hand at the Time of paying the Duty, should be exempted? Or can any Consideration whatsoever, make it be look'd upon as not given in respect of the Apprentice? Yea, were any Thing considerable given immediately after paying of the Duty, it might be regarded as given in defraud of the Law, and with Design to elude it.

It being once clear what was really liable, the next Thing to be done, was to provide for the ready levying, and to guard against Frauds, and in order to this, there is a Clause, whereby *the full Sum or Sums of Money received, or in any ways directly or indirectly given, paid, agreed, or contracted for, with, or in relation to every Clerk, Apprentice, &c. shall be truly inserted and written in Words at length, in some Indenture or other Writing, which shall contain the Covenants, Articles, Contracts or Agreements relating to the Service of the Clerk, Apprentice, or Servant.* Can it be supposed, that a Sum so considerable as an eighth Part and more, of what is specified in an Indenture, given a very short Time after signing that Indenture, and before the Duty was paid for it, must not be regarded as given in defraud of the Law? Or can this Clause, which was intended for the Security of the Act, and obviating Frauds, be either explained away altogether, or explained in such a Manner as to be a Cover to Frauds, and defeat the plain Meaning and Intention of the Act?

It is very certain likewise from this Clause, that the Sum liable to the Duty, must not be restricted to what is given upon the Account of the Apprentice being taught his Employment; for the Act ordains, that every *Thing given, &c.* shall be inserted in the Writing that contains the Covenants, Articles and Agreements, whatever these Covenants be, whether for Bed, Board, Washing, or any other Thing, and the Duty is to be paid for the full Sum so inserted, tho' from the Nature of the Thing it is plain, that if Entertainment and other Things had not been covenanted for, so great a Sum would never have been given. As the Defender is, no doubt, well founded in the Intention of the Law, so he might likewise contend, that he has the very Words of it for him, for, when the Act, in order to secure the Publick, as to the Duty of what is really given or agreed for, ordains every such Thing to be inserted in an Indenture or other Writing, it is the very same Thing as if it had said, *that nothing that is not inserted shall be given, or, if it be given, that it shall be looked upon as a fraudulent Omission,* and as given with a plain Intention to elude and disappoint the Law. What Security would this Clause of inserting be to the Publick, if it could be so easily frustrated, as the Petitioner would have it? Or what might be expected from another Clause of this Act, whereby the Master, if he make use of an Indenture as an Evidence in any Suit, is obliged to make Oath, that, *to the best of his Knowledge, the Sum therein inserted or mentioned, was really and truly all that was directly or indirectly given, paid, secured, or contracted for, on Behalf, or in respect of his Clerk, Apprentice or Servant,* to or for his the Master's Benefit. The Master would be very easily off, if this Oath were understood to extend to no more than what was paid or contracted for, before signing the Indenture, and not to comprehend what is given after signing, tho' before Payment of the Duty, and Men of very tender Consciences, might fall upon a thousand Methods to render of no Effect a Law, which, by the very anxious and strong Terms it is conceived in, shews plainly how apprehensive the Makers of it were of Attempts of this Kind.

The Defender thinks it unnecessary in this Place to open any of the just Defences he has against the Charge of Imbezilment of his Master's Drugs, and humbly apprehends, that the Alledgance itself will have no Influence upon your
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Lordships Determination of the Point immediately before you, which is of universal Concern. If the Master has received any Prejudice by Imbezilment or otherwise, no doubt the Law is open to him, tho' if his Claims this Way have no better Appearance than they have had hitherto, it is to be feared he'll have but bad Success.

The Petitioner's Observation, that this Case is the first of the Kind that has appeared in any Court of *North Britain*, and that a great many Masters are very much concerned in the Question, may be true, but it is likewise so, that the Want of a Precedent and of an Opportunity to apply the Law, has but too much encouraged some People in their Contrivances to make it ineffectual. The Practice of concealing a Part of the Apprentice-fee is but too common, *universal* it is not, for the Defender has seen Indentures bearing Date some Years ago, wherein five Guineas given to the Wife, were inserted, and the Duty paid therefore. The Multitude of Offenders may indeed be an Argument to the Legislature and those who have Power to make Laws, for some Indulgence in abating and mitigating the Rigor of them, but it can be no Reason against putting a Law in Execution, that a great many have either contravened it, or are unwilling to obey it. 'Tis to be feared, that if your Lordships should alter your Interlocutor, People will look upon it as a Way chalk'd out to them safely to elude the Law, and in a little Time, instead of five Guineas given to a Wife, we may perhaps see fifty, the Way would be plain, and People would give themselves no further Trouble either to follow or invent any other Method.

The Petitioner's Argument from the Smallness of the Sum of five Guineas, and the Duty payable upon it, is not well understood, for there are Cases wherein the whole Apprentice-fee does not amount to so much, and the Act of Parliament is so exact in laying on the Duty, that it directs what is to be paid for any Sum under Twenty Shillings, and that in Proportion to what is paid for Twenty Shillings it self, and the Penalties are annexed even to the Omissions of paying for such lesser Sums, and there is Reason it should be so, for of however small Consideration the Duty of these Sums might be to every particular Person, yet by a common Practice of Concealment of such Sums, the Publick might come to be defrauded to a great Value. As to Negligence and Inadvertency, tho' they may be, and have in this very Case been Reasons for the Parliament to grant Indemnities, yet without such, they can never be look'd upon as of themselves sufficient Excuses for the Breach of a plain Law. That the Petitioner acted imprudently in concealing, and not inserting the five Guineas, will be allowed, but that there is any such Presumption for him, as that he was incapable of Concealment otherways than by Oversight, is not so plain.

The Petitioner's innocent Intention, as he is pleased to call it, cannot be doubted by the Defender, after such a Proof of it as he has himself given, by charging in this very Process, for the Duty he actually paid, and which the Act of Parliament expressly burdens the Master with, and the very Receipt of which, if he had got it at the Time he got the five Guineas, would have subjected him to more Duty, and if omitted to be inserted would have laid open his Indenture. That five Guineas is an ordinary Compliment to a Master's Wife, and that it was in Use before the Statute (as is observed by the Petitioner) is very true, and may lead us among other Things in to the Reason of these careful and strong Expressions, *directly, or indirectly, given, paid, &c.*

It is surprising to see an Argument brought from the Words of the Act of Parliament, *which shall be put or placed to any Master to learn any Profession, Trade or Employment*, as if they imported that the Act concerned only what was given for an Apprentice's Instruction. They are plainly exegetick of the Word *Apprentice*, and if there be any Emphasis to be put upon these Words at all, it must not be upon the Word *Learn*, but upon the Words *Profession, Trade, or Employment*, to shew that all Kind of Apprentices were designed to be included.

The Defender is obliged to take Notice, that the Words in the Bill, *Contracted for, in Relation to his being taught an Employment*, printed in *Italick Character*, and seeming to be the Words of the Statute are not so. An Apprentice's paying for a Suit of Clothes to his Master, who is supposed to be a Cloth Merchant, would no

more fall within the Statute than the very five Guineas now in question, if they had been paid, for curing the Apprentice of a Disease.

As to the Supposition of two several Agreements in Relation to an Apprentice, one for his Instruction, and another for his Board, there will appear to be nothing in it, if it be considered, that the Entertainment of an Apprentice is the usual Attendant and natural Effect of an Apprentice-fee, which as contained in an Indenture, is understood both by Law and Custom, to be what the Master looks upon as a just Equivalent for the necessary Trouble and ordinary Consequences of an Apprenticeship. And the Act of Parliament has thought fit to impose a Duty upon the whole of a Fee so contained, without excepting any Proportion of it from that Duty upon the Account of its being given, not for Instruction, but for Board or Entertainment, yea, the Law seems expressly to have excluded such a separate Agreement as is here contended for, and the Indenture or other Writing, wherein the Apprentice-fee is to be inserted, is to contain the Covenants, Articles, Contracts, and Agreements, &c. But this has been so fully answered in our Information, that it needs not be insisted on. Only we may notice, that the Petitioner has found out a rare Expedient for disappointing the Payment of the Duties on Apprentice-fees. For, says he, *A Man may take 300 Merks on Account of the Apprentice's being taught the Art of Surgery, for Instance, and besides, he may bargain for another Sum upon Account of the said Apprentice's Board and Aliment.* Now if this separate Sum be equal to the 300 Merks, the Half of the Duty is saved, if it be larger, then so much the better, and so much the more is saved. To improve upon this, as it is easie to do when Things are once found out, let 200 Merks be taken away from the 300 Merks, and added to the other Sum, and both together coming into the Master's Pocket, the only Inconveniency will be, that the King will be fairly tricked out of his Duty. Again, let us suppose that the Sum contained in the Indenture is 50 L. and the Sum in the separate Agreement is another 50 L. according to the Petitioner's Method, not only would the 50 L. in the separate Agreement be exempted from Duty, but likewise the very 50 L. inserted in the Indenture would pay less than if it were accumulate with and reckoned a Part of the whole Sum of 100 L. for in the one Case, the Duty would be 1 L. 5 sh. and in the other it would be no less than 5 L. The Practice of *South Britain*, as observed by the Petitioner, is positively denied, and even the Practice of this Part of the Country has suffered a great Alteration since the Commencement of this Process.

The Petitioner takes Notice, that the Word *Paid* must be restricted to a Case where the Apprentice Fee at the Time of executing an Indenture is instantly paid down, and the Words *contracted and agreed for*, to a Case where the Apprentice Fee is only stipulated to be thereafter paid, and that the Word *Paid* can never relate to any Sums paid after signing the Indenture, if not contracted and agreed for, and by mustering up Difficulties, endeavours to shew, that upon any other Interpretation the Thing would be inextricable. The Petitioner takes no Notice of the Word *Given*, because, as is supposed, what is given is a Gift, and so his Gratuity would be in Danger of falling under the Statute. But all this nice Explication will be of no Use, if it be considered that the Sum of 5 Guineas being a customary Compliment used to be agreed for, must, when paid a short Time after signing the Indenture, and before the Duty was answered for, be presumed to have been so paid in Defraud of the Law, since the Circumstance of the Time, as well as the Master's late Treatment of the Apprentice, allows no Room for the Pretence of such Service and kind Usage, as deserved a Remuneration of no less than an Eighth Part of the Fee, and since, as the Petitioner very well observes, few People pay Sums that they are not obliged to pay. So that from this Fact of the Payment of 5 Guineas, an antecedent Bargain is inferred and justly presumed, and that there was a Communing about this Matter, is in a Manner owned by the Petitioner, when, in the Information given in for him, he does not scruple to say, that *however a Compliment might have been mentioned, yet no particular Sum was promised and insisted for, but the Matter left intirely to the Apprentice's Friends.* It is submitted to your Lordships how far this was a *contracting for indirectly*, and how far a Bargain for a Compliment in general, would fall under the Act; and lastly, how far it was necessary to be very particular in fixing a Thing which was sufficiently settled by Custom. It is needless to enter upon the Question, what proper Compulsitor *Mrs. Horsburgh* might have had

had for forcing the Payment of her Compliment, Masters Wives are ingenious enough in Things of this Kind.

But then in the next Place, the Reason of paying a Duty being, that any Thing is given, or even so much as contracted to be given, and the inserting in an Indenture being pitched upon as a Rule and Standard to ascertain the Quantity of the Duty, whatever at the Time of the Payment of the Duty has been given, and is not found inserted, must be presumed fraudulently omitted. And the Act of Parliament, ordaining every Thing given, paid, &c. to be inserted in an Indenture under a Penalty, must be understood to impose that Penalty, *when any Thing not inserted is given, as well as when any Thing given is not inserted*; so that the Rule and Thing to be measured by it may perfectly agree. It is very true, that an Indenture must bear Date upon the Day of its Execution, that the Duty may be known to be paid within the Time limited by Law; but then as to the Quantity of the Duty, it ought to be held as of a Date with the Payment or Tender. There is no such insuperable Difficulty as the Petitioner imagines in this, that the Statute mentions inserting in an Indenture, and that it is strange to suppose Sums paid inserted in an Indenture prior to the Payment. Had the Act said no more, but that for every Thing paid, given, &c. with, or in relation to an Apprentice, the Duty should be answered, then no Doubt every Thing would have been liable, that at the Time of Payment or Tending had actually been received. And the Clause of inserting being for no other Purpose, but that all Things should be easily, readily, and certainly known, it follows that the Indenture, with regard to the Duty, must be considered as of the Date of Payment or Tender. As to the Petitioner's Difficulties, where is the vast Hardship, when any Thing has been given betwixt the Execution and Payment, either to write over the Indenture, if that can be conveniently done, or to make some other Writing, as an Eik or Addition to it; or, which is the easiest of all, and the ordinary Practice at the Stamp Office, to have it inserted in the Receipt given by the Collector of the Stamp-duties on the Back of the Indenture at the Time of paying the Duty?

But to make an End of this, if any Thing be given upon any Account whatsoever after signing an Indenture, and before paying the Duty, the Defender humbly thinks it is the Meaning of the Law, requiring every Thing given to be inserted in an Indenture or other Writing, (which Indenture and other Writing, is to contain the Covenants, Articles and Agreements) that every Thing so given must pay the Duty, and for that End, and Security of Payment, be inserted in a Writing, which must be made, and contain both the Thing given, and the Cause for which it was given, and that a new Payment or Giving requires a new Writing. So the Absurdity of inserting posterior Payments in a prior Indenture is intirely avoided, and the Words *paid, contracted, &c.* are taken in the Petitioner's Sense. There can arise no Prejudice to the Apprentice from a second Writing, for the Time of his Service will begin to run from the Date of the Execution of the First.

The Argument, that the Master ought at least to have tendred the Duty of the Sum, that was paid after signing, will not appear to be of so little Weight as the Petitioner pretends, nor will the Reason for his Opinion, *viz.* that there is no Provision in the Statute for allowing such a Tender, avail much, if the Indemnity *anno undecimo Georgii*, being the last Clause in the Malt Act, be look'd into; for, by the said indemnifying Clause, Mr. *Horsburgh* had a full Opportunity afforded him, not only of having the Indentures stamped upon Payment of the Duty for the Sum therein contained, which indeed he had omitted to do within the Time prescribed by Law, whereby the Indenture 'twixt Mr. *Heslopp* and him would have been void, without the Benefit of the said Indemnity, but he also had an Opportunity afforded him of tendring the Duty of the Five Guineas paid to his Wife, which can be look'd upon to have been paid upon no other Consideration, than that of Mr. *Heslopp's* becoming his Apprentice, whereby he would have purged this very Nullity now objected to the Indenture, and found by your Lordships; and Mr. *Horsburgh* cannot refuse, but the said Five Guineas were paid before the Time that the Duty was tendred, in order to have the Indentures stampd, and when he thought it proper to take the Benefit of the Indemnity, to have the Indentures stampd, and to pay the Duty for the Sum therein mentioned, why did he not, at the same Time, take the Benefit of the said Indemnity, by paying the Du-
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ty of the Five Guineas given to his Wife, and which, by being omitted out of the Indentures, rendered them as effectually void as if they had not been stamped at all. Surely no other Reason can be assigned for it, but a covetous Desire of saving or gaining as much as he could, which he might be the more easily induced to through the Hopes he had of its never being brought to Light. And it is an extreme weak Argument in the Petitioner, that offers it self almost at every Period, viz. Is it to be imagined, that Mr. *Horsburgh*, for the Sake of Half a Crown, to which the Duty of the Five Guineas only amounted, would expose himself to the Penalties of the Act in relation to the stamp Duties? But if the Petitioner would consider the Effect of Covetousness, which has no other Rule but to gain, and save as much as possible, that same Vice will induce a Man to lay out 100 L. where the withholding of it cannot be concealed, and may bring him under a Penalty, and, at the same Time, tempt him to withhold a Halfpeny, where he has any probable Hope of his Fraud being undiscovered, and thereby eviting the Penalty. Mr. *Horsburgh* thought fit to take the Advantage of this very Indemnity, by paying the Duty of what was inserted in the Indenture; and, as he was directed and authorized by the Statute, to pay the Duty of the Sum not inserted, so if he had not continued in his designed Concealment, his Indenture would have been good and available in Law.

The last Argument insisted upon in the Petition, drawn from the Impossibility of restraining the Petitioner's Wife from taking Money given her with his Knowledge, will conclude as well in the Case of Usury, where a Husband receives 5 per cent. and the Wife something more, as it possibly can do in the present Question, and, with Submission, concludes nothing in either.

Upon the whole, 'tis, with the greatest Submission, hoped, that your Lordships will be pleased to adhere to your Interlocutor, and refuse the Desire of the Petition.



THO. FORBES.

Follows the INDEMNITY.

AN D for Relief of any Person or Persons, who through Neglect or Inadvertence have omitted to pay the several Rates and Duties, or any Part thereof, upon Monies given, paid, contracted or agreed for, with, or in relation to any Clerk, Apprentice, or Servant, which hath been put or placed, to or with any Master or Mistress, to learn any Profession, Trade, or Imployment, and to have such Indentures, or other Writings which shall contain the Covenants, Articles, Contracts or Agreements relating to the Service of such Clerk, Apprentice, or Servant, stamped within the Times by the several Acts of Parliament, for those Purposes, respectively limited, or who have also, in like Manner, omitted to insert and write, in Words at Length, in such Indentures, or other Writings, as aforesaid, the full Sum or Sums of Money, or any Part thereof, received, or in anywise directly or indirectly given, paid, agreed, or contracted for, with, or in relation to every such Clerk, Apprentice or Servant, as aforesaid, Be it Enacted by the Authority aforesaid, That, upon Payment of the Rates and Duties upon Monies, or such Part of such Monies so neglected or omitted to be paid, as aforesaid, on or before the 24 of June, 1725. to such Person or Persons to whom the same ought to be paid, and tending the said Indentures, or other Writings to be stamped, at the same Time, or at any Time on or before the 29 Day of September, 1725. of which timely Notice is to be given in the London Gazette, the same Indentures, or other Writings, shall be good and available in Law and Equity, and may be given in evidence in any Court whatsoever, and the Clerk, Apprentice, or Servant therein named, shall be capable of following and exercising their respective intended Trades or Implements, as fully as if the Rates and Duties, so omitted, had been duly paid, and the full Sum or Sums received, or agreed for, as aforesaid, had been inserted, and the Persons, who have incurred any Penalty by the Omissions aforesaid, shall be acquitted and discharged of and from the said Penalties; any Thing in any of the said former Acts, to the contrary in any ways notwithstanding.

ANSWERS

FOR

ROBERT HESLOPP,

TO

The Petition of *Alexander*
Horsburgh Chirurgion,

1727

NEWSPAPER

FOR

RECEIVED

OF

THE OFFICE OF THE
RECORDS AND DEEDS

1881

